U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Administrative Appeals, MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: APR 28 2009

LIN 06 164 51652

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Mari Johnson

John F. Grissom
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) sustained a subsequent appeal. On June 16, 2008, the AAO reopened the matter on U.S. Citizenship and Immigration Services (USCIS) motion. The AAO afforded 30 days in which to respond to this notice pursuant to 8 C.F.R. § 103.5(a)(5)(ii). Additional time to respond was granted on July 15, 2008. The petitioner has now responded. The previous decision of the AAO will be withdrawn and the petition will be denied.

The petitioner provided banking and finance services. It seeks to employ the beneficiary permanently in the United States as a computer software engineer (Technical Specialist II) pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the beneficiary did not possess a Master's degree.

On appeal, counsel noted that the ETA Form 9089 and the recruitment for the position both indicated that a foreign equivalent Master's degree was acceptable. The petitioner submitted new evaluations and expert opinions all concluding that the beneficiary's Master of Science degree is equivalent to a Master of Science degree in Physics from an accredited U.S. university. Based on these evaluations, the AAO sustained the appeal.

Subsequently, the AAO acquired new information that contradicted the evaluations provided. Moreover, the AAO sustain was in error because the petitioner had not submitted the required initial evidence of the beneficiary's experience. Thus, the AAO issued a notice on June 16, 2008 reopening our prior decision and affording an opportunity to respond to the derogatory information obtained by the AAO.

In response, counsel addresses the merits of the AAO's proposed bases of denial, which will be discussed below. Counsel also asserts that the AAO was not justified in reopening the matter absent a finding of fraud. Rather, counsel asserts that the principle of *res judicata* bars the reopening of this matter. Finally, counsel requests that the AAO "keep the contents of this filing as well as any subsequent ruling confidential and not make it available to the public." Counsel submits letters verifying the beneficiary's experience, a letter from the principal at Andhra Loyola College attesting to the college's accreditation, evidence of accelerated programs in the United States and a new evaluation of the beneficiary's credentials. Counsel subsequently supplements the response with correspondence between counsel's law firm and the entity that published the information found to contradict the evaluations of record.

The regulation at 8 C.F.R. § 103.2(a)(5) expressly allows for motions by a USCIS officer. Subparagraph (ii) of this provision specifically contemplates motions by a USCIS officer where the ultimate outcome may not be favorable to the affected party. Nothing in the regulation at 8 C.F.R.

§ 103.2(a)(5) limits the authority of a USCIS officer to reopen a decision, such as precluding a USCIS officer from reopening a decision that is favorable to the affected party absent fraud.

The approval of a visa petition vests no rights in the beneficiary of the petition, as approval of a visa petition is but a preliminary step in the visa application process. *Matter of Ho*, 19 I&N Dec. 582, 589 (BIA 1988). By way of analogy, the director's realization that a petition was incorrectly approved is good and sufficient cause for the revocation of the approval of an immigrant petition. *Id.* at 590.

The AAO, like the Board of Immigration Appeals, is without authority to apply the doctrine of equitable estoppel so as to preclude a component part of USCIS from undertaking a lawful course of action that it is empowered to pursue by statute or regulation. *See Matter of Hernandez-Puente*, 20 I&N Dec. 335, 338 (BIA 1991). *Res judicata* and estoppel are equitable forms of relief that are available only through the courts. The jurisdiction of the AAO is limited to that authority specifically granted to it by the Secretary of the United States Department of Homeland Security. *See* DHS Delegation Number 0150.1 (effective March 1, 2003); *see also* 8 C.F.R. § 103.1(f)(3)(E)(iii)(as in effect on February 28, 2003). Accordingly, the AAO has no authority to address the petitioner's equitable estoppel and *res judicata* claims.

Assuming arguendo that the AAO could adjudicate a claim of equitable relief, counsel's assertions are not persuasive. The AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm'r. 1988). It would be absurd to suggest that USCIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

With respect to counsel's request that the AAO not make the contents of this filing or a subsequent decision public, counsel has not explained the basis of this request. Both the Freedom of Information Act (FOIA) and the Trade Secrets Act provide for the protection of a petitioner's confidential business information when it is submitted to USCIS. *See* 5 U.S.C. § 552(b)(4); 18 U.S.C. § 1905. Additionally, the petitioner may request pre-disclosure notification pursuant to Executive Order No. 12,600, "Predisclosure Notification Procedures for Confidential Commercial Information." 1987 WL 181359 (June 23, 1987).

We stress that this decision is, as are most of the decisions issued by the AAO, "unpublished" in that it is not designated as a precedent in accordance with 8 C.F.R. § 103.3(c). That said, the regulatory provisions discussing the availability of decisions under FOIA at 8 C.F.R. §§ 103.9(b), (e) provide that the Central Office "will maintain" unpublished decisions that are available to the public in "public reading rooms." We also note that USCIS FOIA office maintains an "Electronic Reading Room" at http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2ef1b0f8a0150110VgnVCM1000000ecd190aRCRD&vgnextchannel=2ef1b0f8a0150110VgnVCM1

000000ecd190aRCRD, which includes the AAO's administrative decisions. Those decisions, however, are redacted to prevent the release of information identifying the petitioner or beneficiary.

Again, counsel has not explained the basis for the request that the file and decision not be released, so it is impossible for the AAO to determine whether counsel's concerns relate to the release of confidential business information, identifying information regarding the petitioner or beneficiary, or something else.

Having rejected counsel's procedural concerns, we now address the merits of the petition. In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2).

The beneficiary possesses a foreign three-year bachelor's degree and a two-year Master of Science degree in Physics from Andhra University. Thus, the issue is whether this education can serve to qualify the beneficiary for the classification sought and the certified job requirements.

Eligibility for the Classification Sought

As noted above, the ETA 750 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith,* 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

The AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.* 817 F. 2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS,* 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001)(unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

Previously, the petitioner had not claimed that the beneficiary's three-year degree was equivalent to a U.S. baccalaureate. In fact, the initial evaluation from [redacted] explicitly states that the beneficiary's three-year degree is "equivalent to three years of university-level credit in mathematics, physics and electronics from an accredited university in the United States." [redacted] then concluded that the beneficiary's combined education (three-year baccalaureate plus

two-year Master's degree) was "equivalent to a combined bachelor's and master's degree in physics from an accredited university in the United States." [redacted] purports to rely on a Project for International Education Research (PIER) publication.

The record also contained three additional evaluations from [redacted] of Medgar Evers College of the City University of New York, who lists no reference materials and claims to be a member of the American Association of Collegiate Registrars and Admissions Officers (AACRAO), [redacted] of Princeton University who lists no reference materials and [redacted] of the Trustforte Corporation who indicates he is a member of AACRAO.

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795. USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)).

As advised in our June 16, 2008 notice, despite the claims to have relied on PIER materials and AACRAO membership, the above evaluations do not, in fact, conform to information in the PIER materials or the juried AACRAO placement recommendation.

Specifically, given that the evaluators in this matter purport to be members of AACRAO and to rely on PIER materials, we have consulted the Electronic Database for Global Education (EDGE) created by AACRAO and the PIER materials themselves. AACRAO, according to its website, is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." AACRAO, http://www.aacrao.org/about/ (last accessed March 27, 2008) (copy incorporated into the record of proceeding). Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." *Id.* According to the login page, EDGE is "a web-based resource for the evaluation of foreign educational credentials" that is continually updated and revised by staff and members of AACRAO. [redacted] Director of International Education Services, "AACRAO EDGE Login," http://aacraoedge.aacrao.org/index.php (last accessed March 27, 2008) (copy incorporated into the record of proceeding).

Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement

recommendations are included the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

In the section related to the Indian educational system, EDGE provides that a two-year Master's degree following a three-year bachelor's degree "represents the attainment of a level of education comparable to a bachelor's degree in the United States." Based on this peer-reviewed placement recommendation, we must conclude that the beneficiary's education in this matter is only equivalent to a bachelor's degree from a regionally accredited institution in the United States.

In response to our June 16, 2008 notice, counsel complains that EDGE requires paid membership to view the recommendations. The petitioner, however, has submitted an evaluation from an AACRAO member, [redacted]. Thus, the AACRAO position on this issue is relevant in considering [redacted] evaluation.

In addition to EDGE, our conclusion is also supported by two of AACRAO's Project for International Education Research (PIER) publication publications: *A P.I.E.R. Workshop Report on South Asia: The Admission and Placement of Students from Bangladesh, India, Pakistan and Sri Lanka* (1986) and the *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* (1997). As with EDGE, these publications represent conclusions vetted by a team of experts rather than the opinion of an individual. The placement recommendation in the 1986 publication for a three-year baccalaureate followed by a two-year Master's degree is as follows: "May be considered for graduate admission with no advanced standing." The 1997 publication incorporates the first degree and education degree placements set forth in the 1986 publication. The *P.I.E.R World Education Series India: A Special Report on the Higher Education System and Guide to the Academic Placement of Students in Educational Institutions in the United States* at 43.

Regardless of whether the PIER publications are free to the public, [redacted] claimed to rely on the PIER publications. Thus, the information in those publications is relevant in considering [redacted] evaluation. As stated above, [redacted] initially provided no explanation for deviating from the placement recommendations in that publication regarding Indian two-year Master's degrees following a three-year baccalaureate.

In response to our June 16, 2008 notice, counsel asserts that the beneficiary's three-year degree actually represents more coursework than a U.S. baccalaureate. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 n.2 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1, 3 n.2 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). Counsel submits a new evaluation from [redacted] Significantly, he continues to conclude that the beneficiary's three-year degree is only equivalent to three years of undergraduate education in the United States. Regarding the beneficiary's two-year Master's degree, [redacted] notes that there are several programs in the United States that allow students to obtain a Master's degree in less than two years. He concludes that the beneficiary has the equivalent of a U.S. Master's degree and continues to list the PIER publication as one of his sources.

Subsequently, counsel submits correspondence from counsel's law firm addressed to [redacted] of AACRAO requesting an explanation as to EDGE's conclusions regarding Indian degrees in light of the coursework required for a three-year degree in India and a response from [redacted] Associate Director of Marketing and Editor of International Publications for AACRAO. Counsel emphasizes that [redacted] points out that she should not be considered to have a doctorate simply because she took three years to complete a Master's degree at night. Counsel, however, ignores [redacted] statements regarding the beneficiary's education. [redacted] point in noting the time it took her to complete a Master's degree is not that the number of years for a specific program is irrelevant, but that students may complete that program in less or more time by compressing or stretching out their coursework.

The existence of accelerated programs in the United States is not useful in evaluating unrelated foreign degrees. At issue is not whether it is possible to obtain a baccalaureate in less than four years in an accelerated program in the United States or elsewhere, but the actual equivalence of the specific degree the beneficiary obtained. The beneficiary did not compress his studies to obtain a degree in less than four years from an institution that grants four-year degrees. Rather, he completed the regular program of study for a three-year degree program. Thus, at issue is the equivalence of the three-year program he actually completed. As stated by [redacted]:

> The example that you gave about US students who finish four year degrees in three years is not the same situation. Those students have chosen, for whatever reason, to compress the curriculum into their own terms. The amount of course work has not changed, nor have the requirements.

[redacted] stresses that one of the basic tenets of foreign credential evaluation is that "a year of education, regardless of where it is taken or what courses are pursued is equivalent to a year." She concludes: "With that fact in mind, someone who graduates from a 3-year baccalaureate program has essentially completed only three-quarters of what a US student would do." Significantly, despite counsel's assertions as to the contrary, [redacted] and the publication on which he relies (discussed below) reach the same conclusion; specifically that the beneficiary's three-year degree is equivalent to three years of undergraduate education in the United States. Thus, no evidence in the record, including the evaluations submitted by the petitioner, purports to characterize the beneficiary's three-year degree as equivalent to a U.S. baccalaureate. The only issue, then, is the equivalency of the beneficiary's Master degree.

Counsel notes that [redacted] acknowledges that "the credential evaluation process is not an exact science. Different respectable agencies will look at credentials from the same country and, perhaps, come with a different equivalent." Counsel asserts that the AAO and USCIS should not consider EDGE absolute.

We do not consider EDGE absolute or definitive. While a foreign credential evaluation is not required by regulation, the petitioner chose to submit several as evidence of the equivalence of the beneficiary's education. Thus, at issue is whether these evaluations are consistent and well supported.

We acknowledge that [redacted] supports his most recent evaluation of the beneficiary's Master's degree with a page from the *New Country Index*, published by the International Education Research Foundation (IERF). Page 149 of this publication concludes that while an Indian three-year baccalaureate plus a one-year Master's degree is only equal to a U.S. baccalaureate,[1] more than four years of post-secondary education in India resulting in a Master's degree is equivalent to a U.S. Master's degree. We do not lightly reject this evidence. Nevertheless, as stated above, the AACRAO and PIER materials are juried. Despite our emphasis on the juried nature of the PIER materials in our June 16, 2008 notice, the petitioner has not established that the *New Country Index* is similarly juried. Without such evidence, the petitioner cannot overcome the contradictions noted in our June 16, 2008 notice.

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

> Visas shall next be made available . . . to qualified immigrants who are members of the professions . . . .

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

> Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent . . . .

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244 is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the professions." H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (October 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien "must have a bachelor's degree" when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency's previous treatment of a "bachelor's degree" under the Act when the new classification was enacted and did not intend to alter the agency's interpretation of that term. *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it

[1] By implication, IERF is not concluding that an Indian three-year degree, by itself, is equivalent to a U.S. baccalaureate.

adopts a new law incorporating sections of a prior law). *See also* 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor's degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor's degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor's degree:

> The Act states that, in order to qualify under the second classification, alien members of the professions must hold "advanced degrees or their equivalent." As the legislative history . . . indicates, the equivalent of an advanced degree is "a bachelor's degree with at least five years progressive experience in the professions." Because neither the Act nor its legislative history indicates that bachelor's or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor's degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree." For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study."

As stated above, notwithstanding the letter from Andhra Loyola College discussing the college's status in India and counsel's assertions to the contrary, [redacted] continues to conclude that the beneficiary's three-year degree is only equivalent to three years of undergraduate education in the United States. There is no evidence in the record that contradicts that conclusion. For the reasons discussed above, the petitioner has not overcome the juried placement recommendations that contradict the evaluations of record regarding the beneficiary's Master degree. As the beneficiary's education is only equivalent to a U.S. baccalaureate, it then becomes necessary to determine whether he has the necessary five years post-baccalaureate experience to qualify for the classification sought and whether he meets the job requirements set forth on the alien employment certification.

The petitioner must establish that the beneficiary was eligible for the classification sought as of the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d); 8 C.F.R. §§ 103.2(b)(1),

(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971). The ETA Form 9089 in this matter was accepted for processing on November 9, 2005.

The beneficiary received his Master's degree, which we have determined is equivalent to a U.S. baccalaureate, on April 2, 1998. On the ETA Form 9089, the beneficiary lists employment as of June 26, 2000. The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence of experience shall consist of letters from employers. As stated in our previous notice, the petitioner had submitted no letters from employers verifying the beneficiary's past employment.

In response, the petitioner submits a letter from [redacted] asserting that the beneficiary worked there as a computer software engineer from June 2000 through April 9, 2004, just under four years. The original cover letter from the petitioner reflects that the beneficiary began working for the petitioner in June 2004. Thus, the petitioner has now established that the beneficiary has five years of post-baccalaureate experience and, thus, qualifies for the classification sought.

Qualifications for the Job Offered

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

> The labor certification made by the Secretary of Labor ... pursuant to section 212(a)[(5)] of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> The Department of Labor ("DOL") must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)[(5)], 8 U.S.C. § 1182(a)[(5)]. The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu, 736 F. 2d at 1309.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, "Job Opportunity Information," describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

In this matter, Part H, line 4, of the labor certification reflects that a Master's degree in Information Technology or a related field is the minimum level of education required. Line 6 reflects that two years of experience are required. Line 8 reflects that no combination of education or experience is acceptable in the alternative. Line 9 reflects that a foreign educational equivalent is acceptable.

The clear and unambiguous language of the ETA Form 9089, certified by DOL, reflects that the job requires a Master's degree and that no combination of education and experience in the alternative is acceptable. As stated above, the beneficiary's education is only equivalent to a U.S. baccalaureate. Thus, he does not meet the job qualifications certified by DOL.

The AAO maintains plenary power to review each appeal on a *de novo* basis. 5 U.S.C. § 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v.*

U.S. Dept. of Transp., NTSB, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989).

Even if we did not uphold the grounds stated in our June 16, 2008 notice, we would have to remand the matter to the director for further inquiry into whether the job offer remains valid in light of the recent events whereby the federal government seized the petitioner's assets and sold them to [redacted]

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be withdrawn, and the petition will be denied.

ORDER: The AAO's decision of December 5, 2007 is withdrawn. The petition is denied.